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NOTES

Detention, Arrest, and Salt Lake City Police Practices

In the literature of the law of criminal procedure it is commonly stated that there is a wide disparity between the standards set by the law and the actual practices of the police.[1] Especially is this claimed to be true in the low visibility area preceding the initial appearance before a magistrate. In the past, it was the rare arrest that was challenged in criminal cases because in most jurisdictions a defendant had nothing to gain from establishing the illegality of his arrest in the first instance.[2] Although any illegal detention can be attacked by means of the writ of habeas corpus,[3] once legal grounds for holding the arrested person are established, the confinement, trial and proceedings thereafter become lawful regardless of the illegality of the arrest.[4] False arrest actions have been limited practically to cases of gross violation of the rights of honest citizens and have had little effect upon day-to-day law enforcement.[5]

However, one of the effects of *Mapp v. Ohio*[6] was to bring the law of arrest into state courts as a critical element in criminal cases.[7] Where evidence is procured incident to an arrest, the rewards of the exclusionary rule make the legality of the arrest a high-priority target for defense attorneys.

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[1] See, *e.g.*, Barrett, *Police Practices and the Law — From Arrest to Release or Charge*, 50 CALIF. L. REV. 11 (1962); Foote, *The Fourth Amendment: Obstacle or Necessity in the Law of Arrest?*, in POLICE POWER AND INDIVIDUAL FREEDOM 29, 32–34 (Sowle ed. 1962); Ploscowe, *A Modern Law of Arrest*, 39 MINN. L. REV. 473 (1955); Warner, *Investigating the Law of Arrest*, 26 A.B.A.J. 151 (1940); Note, *Philadelphia Police Practice and the Law of Arrest*, 100 U. PA. L. REV. 1182, 1212 (1952).

[2] Of thirteen Utah cases reported prior to 1964 and involving questions of arrest law, only four were criminal prosecutions. Two of these, State v. Morgan, 22 Utah 162, 61 Pac. 527 (1900), and People v. Coughlin, 13 Utah 58, 44 Pac. 94 (1896), were murder cases where a defense of resisting illegal arrest was raised unsuccessfully. One case, State v. Beckendorf, 79 Utah 360, 10 P.2d 1073 (1932), was a prosecution for resisting arrest where the fact of whether an arrest occurred was in issue. One case, State v. Green, 78 Utah 580, 6 P.2d 177 (1931), a murder case primarily involving the definition of insanity, also involved irregularities in the issuance of the warrant for the arrest of the defendant. These irregularities were held to have been waived by the defendant when he entered a plea and went to trial.

[3] See, *e.g.*, Fay v. Noia, 372 U.S. 391 (1963); Matter of Kline, 71 Nev. 124, 282 P.2d 367 (1955); *Ex parte* Grisaffi, 140 Tex. Crim. 253, 144 S.W.2d 547 (1940).

[4] *E.g.*, People v. Griffith, 130 Colo. 475, 276 P.2d 559 (1954); *In re* Sinerius, 128 Mont. 456, 276 P.2d 972 (1954); People v. Stice, 161 Cal. App. 2d 610, 327 P.2d 201 (Dist. Ct. App. 1958) (alternative holding). *Cf.* Washington v. Renouf, 5 Utah 2d 185, 299 P.2d 620 (1956).

[5] Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493, 500–02 (1955).

[6] 367 U.S. 643 (1961).

[7] See, *e.g.*, Beck v. Ohio, 379 U.S. 89 (1964). Of course, many states had adopted the exclusionary rule prior to the *Mapp* decision, Elkins v. United States, 364 U.S. 206, 224–32 (1960) (appendix); nevertheless, that decision seemed to set in motion a nationwide awakening of interest in state police practices, resulting in a surge of cases and legislation. State *ex rel.* Branchaud v. Hedman, 130 N.W.2d 628, 630 & n.1 (Minn. 1964). See generally Barrett, *Police Practices and the Law — From Arrest to Release or Charge*, 50 CALIF. L. REV. 11, 12–16 (1962).

It might be anticipated that advancements in the right to counsel and the establishment of more effective methods of providing counsel for the indigent will also bring about more frequent and careful examination of arrest law in the more traditional context of prosecutions for resisting arrest and vagrancy.

Hence, it can be anticipated that any great disparity between law and police practice must soon disappear, and the question arises whether the change will be made in the law or in the police practices or both. It will be the purpose of this note to analyze the present state of the law of arrest and detention in the light of field research with the Salt Lake City Police Department to determine the relevancy and practicality of the law in terms of both effective law enforcement and meaningful individual liberty. It is hoped that this study will not only provide a basis for evaluation of Utah law but will supplement similar studies made in other parts of the country, notably, the extensive American Bar Association survey reported in Professor LaFave's *Arrest: The Decision To Take a Suspect into Custody*.[8] The scope of this analysis will be limited to field detention and arrest by peace officers acting without authority of arrest warrant.

I. Historical Basis of Arrest Law

The roots of arrest law, like those of property law, lie deep in the history of England. The law of arrest as it exists today was fairly described by Matthew Hale prior to 1676,[9] long before the development of organized police departments in the common law jurisdiction. In feudal England, law enforcement was accomplished by means of group responsibility vested in the vills and hundreds, the private members of which were expected to apprehend and deliver to the courts wrongdoers in their midst.[10] This system apparently worked reasonably well in the static medieval community which was virtually devoid of anonymity and mobility. However, as the feudal social system deteriorated responsibility shifted to the justices of the peace and their constables and watchmen. These officers had arrest powers additional to those of a private citizen and equivalent to the common law arrest powers of a modern peace officer.[11] The justice of the peace system, however, proved to be woefully inadequate in face of the great rise in criminal activity that accompanied the rapid increase in urbanization. Nevertheless, the English, alarmed by the totalitarian abuses of the French *gendarmerie*, resisted the adoption of an organized police system until 1829 when Robert Peale finally succeeded in instituting the London "bobbies."[12] In the interim, the English relied on a system of rewards and pardons to stimulate private law enforcement — a system which was neither effective nor resistant to

[8] LaFave, Arrest: The Decision To Take a Suspect into Custody (1965), 9 Utah L. Rev. 827 (1965). This study was based upon extensive field research of police practices in Wisconsin, Kansas, and Michigan. Other studies of varying scope and reliance upon field observation are: Barrett, *Police Practices and the Law — From Arrest to Release or Charge*, 50 Calif. L. Rev. 11 (1962) (California cities); Warner, *Investigating the Law of Arrest*, 26 A.B.A.J. 151 (1940) (Boston, Chicago, Los Angeles, San Francisco and Portland); Note, *Some Proposals for Modernizing the Law of Arrest*, 39 Calif. L. Rev. 96 (1951) (questionnaires and interviews in five California cities); Note, *Philadelphia Police Practice and the Law of Arrest*, 100 U. Pa. L. Rev. 1182 (1952).

[9] *Compare* 2 Hale, Pleas of the Crown 84–97 (1st American ed. 1847), *with* Utah Code Ann. § 77-13-3 (1953).

[10] 4 Holdsworth, History of English Law 521–22 (1924).

[11] 2 Hale, Pleas of the Crown 84–97 (1st American ed. 1847).

[12] 3 Radzinowitcz, A History of English Criminal Law (1957).

abuse.[13] Thus the law of arrest was developed in the context of a citizen enforcement system where arrests were often motivated by greed for blood money, private vendetta, or hope of pardon for the arresting person's own crimes.

The development of arrest law was probably also influenced by the post-arrest predicament of the arrested person in early England. Persons charged with serious offenses were rarely admitted to bail and conditions in the jails of the time were horrible. Jails were run as private businesses and fees were charged for the most elementary "privileges." Those persons arrested who did not have the means to purchase better accommodations were huddled together, often in irons, in dark filthy rooms, and in close proximity to depravity and disease. Under such conditions an arrest could be, and often was, equivalent to a death sentence.[14]

Neither the enforcement system nor the consequences of arrest were much better in colonial America,[15] although the crime rate was probably lower, and it was in light of this experience as well as that of the English that the constitutional and judicial safeguards of the law of arrest were formulated in the New World. This heritage of tight restrictions upon the power of arrest was carried over into the constitutions, statutes, and case law of the new states as they joined the Union.

II. The State of the Law

Grounds for Arrest

The fourth amendment to the federal constitution provides that no arrest warrant shall issue except on probable cause supported by oath or affirmation. However, the Constitution makes no mention of the requirements for arrest without warrant. The United States Supreme Court has reasoned that the requirements for arrest without a warrant cannot be less than for arrest with a warrant because to hold otherwise would destroy the incentive to procure a warrant where practicable.[16] It is now clear that the arrest safeguards of the fourth amendment apply to arrests made by the states[17] and that in cases involving evidence procured by means of a search incident to an arrest, the United States Supreme Court may examine the facts, findings, and record to determine if the fundamental requirements for probable cause have been met.[18] The constitutional validity of the arrest turns upon whether "at the

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[13] 2 *id.* at 33–167.

[14] Warner, *Investigating the Law of Arrest*, 26 A.B.A.J. 151, 152 (1940).

[15] *Ibid.*

[16] Wong Sun v. United States, 371 U.S. 471, 479–80 (1963). The Supreme Court, however, has not indicated that the probable cause requirements for an arrest without a warrant should be greater than the probable cause necessary to procure an arrest warrant. *Ibid.* See Broeder, *Wong Sun v. United States: A Study in Faith and Hope*, 42 Neb. L. Rev. 483, 492 (1963).

[17] See, *e.g.*, Beck v. Ohio, 379 U.S. 89 (1964).

[18] *Ibid.* In Ker v. California, 374 U.S. 23, 34 (1963) the court stated:

> While this Court does not sit as in *nisi prius* to appraise contradictory factual questions, it will, where necessary to the determination of constitutional rights, make an independent examination of the facts, the findings, and the record so that it can determine for itself whether in the decision as to reasonableness the fundamental — *i.e.*, constitutional — criteria established by this Court have been respected.

moment the arrest was made, the officers had probable cause to make it—whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the . . . [arrested person] had committed or was committing an offense."[19]

As vague as the standard is, and it is necessarily vague, it has become fairly concrete through the innumerable cases holding that particular knowledge held by an officer did or did not constitute probable cause.[20] Thus, for example, we know that information from a reliable informer that a specific person has committed a specific crime will constitute probable cause[21] while an anonymous "tip" will not.[22] A judge, faced with the problem of determining whether probable cause existed, like a jury in a negligence case, must determine what would transpire in the mind of that wonderfully hypothetical character, the reasonable man under the circumstances. However, a judge, unlike a jury, may assist himself by comparing the facts with the cases which have come before.[23]

However, the federal constitutional standards are only the fundamental requirements. The states are free to develop additional rules of arrest so long as those rules meet the standards imposed by the fourth and fourteenth amendments.[24]

According to common law and most of the state statutes, an officer may arrest for misdemeanor only if the offense is committed in his presence and the arrest is made immediately or upon close pursuit.[25] The prerequisite "in his presence" requires that the officer be aware by direct sensory perception

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[19] Beck v. Ohio, 379 U.S. 89, 91 (1964).

[20] The Supreme Court declared in Wong Sun v. United States, 371 U.S. 471, 479 (1963), that:

> [A]n arrest with or without a warrant must stand upon firmer ground than mere suspicion . . . though the arresting officer need not have in hand evidence which would suffice to convict. The quantum of information which constitutes probable cause . . . must be measured by the facts of the particular case.

The probable cause test is designed to strike a reasonable and proper balance between the protection of the individual citizen's rights against unreasonable interferences with privacy and the countervailing reasonable necessities of law enforcement for the protection of the community. Brinegar v. United States, 338 U.S. 160, 175–76 (1949). For an extensive compilation of cases defining probable cause see MARTIN, PROBABLE CAUSE TO ARREST AND ADMISSIBILITY OF EVIDENCE (rev. ed. 1960).

[21] Draper v. United States, 358 U.S. 307 (1959). The Supreme Court in upholding the arrest relied heavily on the fact that the informer was known by the arresting officer and that the informer's tips had proved accurate in the past.

For a comparison with a recent Supreme Court case holding that an informer's tip would not sustain an arrest see Wong Sun v. United States, 371 U.S. 471, 479 (1963). Broeder, *Wong Sun v. United States: A Study in Faith and Hope*, 42 NEB. L. REV. 483, 501 (1963).

[22] See, *e.g.*, United States v. Kind, 87 F.2d 315, 316 (2d Cir. 1937). *But see* Willson v. Superior Court, 46 Cal. 2d 291, 294–95, 294 P.2d 36, 38 (1956) which states that information of an anonymous informer is relevant on the issue of probable cause, but that in the absence of a pressing emergency, an arrest may not be made solely upon such information. See generally LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 265–74 (1965).

[23] See, for example, the comparisons made between the instant fact situations and the facts of earlier cases in Beck v. Ohio, 379 U.S. 89 (1964).

[24] *E.g.*, Ker v. California, 374 U.S. 23, 30–32 (1963).

[25] *E.g.*, McBride v. United States, 284 Fed. 416 (5th Cir. 1922); Coverstone v. Davies, 38 Cal. 2d 315, 239 P.2d 876 (1952); ARIZ. REV. STAT. ANN. § 13-1403 (1956); CAL. PEN. CODE § 836.

that an offense is being committed.[26] A limited number of states, by statute, authorize arrest for misdemeanors committed outside the presence of the officer provided that the officer has probable cause to believe that the offense was committed by the arrested person.[27] There are variations on both of the above standards limiting arrest without warrant to particular classes of crimes or to situations where there is reason to believe that the offender will escape being brought to justice.[28]

Generally, an arrest may be made for felony without a warrant where the offense is committed in the presence of the officer or upon probable cause.[29] Fifteen states, including Utah, attempt to legalize arrest without probable cause where the person arrested actually had committed the felony for which he was arrested.[30] While these statutes might protect the officer from a tort action, it would seem to be apparent that an arrest under such a statute would be unconstitutional.[31]

The Utah statutory law of arrest is typical of state laws codifying the common law requirements. In Utah, an officer can make an arrest for any offense committed or attempted in his presence.[32] Further, when a felony has actually been committed, an officer may arrest a person he has reasonable cause — that is, probable cause — to believe committed the crime.[33] At night, an arrest may be made when the officer has reasonable grounds to believe that the person to be arrested has committed a felony whether or not a felony has actually been committed.[34]

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[26] Presence is usually thought of as the state of being in view. However, it is often determined that an offense is considered as taking place within the presence of an officer when any of his senses afford him knowledge that it is being committed. For example, in McBride v. United States, 284 Fed. 416 (5th Cir. 1922), *cert. denied*, 261 U.S. 614 (1923), the "in presence" requirement was held to include the senses of hearing and smell.

For further elaboration on this issue see LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 231–43 (1965); 4 WHARTON, CRIMINAL LAW AND PROCEDURE § 1599 (Anderson ed. 1957); Perkins, *The Law of Arrest*, 25 IOWA L. REV. 201, 231–32 (1940).

[27] ILL. ANN. STAT. ch. 38 § 107-2 (Smith-Hurd 1964); IOWA CODE § 755.4 (1958); WIS. STAT. ANN. § 954.03(1) (1958). A few courts on their own initiative have held that an officer can arrest a misdemeanant if he has probable cause to believe that an offense has been committed. See United States v. Grosso, 225 F. Supp. 161 (W.D. Pa. 1964); Hill v. Day, 168 Kan. 604, 215 P.2d 219 (1950); State v. Hutchins, 43 N.J. 85, 202 A.2d 678 (1964). Some jurisdictions have held that an officer can arrest a misdemeanant if he has probable cause to believe that the offense is being committed in his presence. Garske v. United States, 1 F.2d 620 (8th Cir. 1924); Care v. Cooley, 48 N.M. 478, 152 P.2d 886 (1944); State *ex rel.* Verdis v. Fidelity & Cas. Co., 120 W. Va. 593, 199 S.E. 884 (1938). *Contra*, People v. Caliente, 12 N.Y.2d 89, 187 N.E.2d 550, 236 N.Y.S.2d 945 (1962) which held that the arresting officer must have actual knowledge that a misdemeanor is being committed in his presence.

[28] See LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 21 (1965).

[29] See, *e.g.*, Ker v. California, 374 U.S. 23, 34–35 (1963).

[30] UTAH CODE ANN. § 77-13-3(2) (1953). See Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 332 (1942).

[31] An arrest which is not based upon the probable cause requirement within the meaning of the fourth amendment is illegal. The suspect's guilt at the time he is arrested does not justify an otherwise illegal arrest. See, *e.g.*, Wong Sun v. United States, 371 U.S. 471 (1963); Gatlin v. United States, 326 F.2d 666 (D.C. Cir. 1963).

[32] UTAH CODE ANN. § 77-13-3(1) (1953).

[33] UTAH CODE ANN. § 77-13-3(3) (1953).

[34] UTAH CODE ANN. § 77-13-3(5) (1953).

What Constitutes Arrest

A great deal of controversy in the area of arrest law is rooted in the question of what constitutes an arrest. Two definitions of arrest are commonly given: The first, which is usually found in tort law sources, is that any deprivation of freedom of movement constitutes an arrest, regardless of the purpose or intent of the arresting person and regardless of the duration of the imprisonment.[35] The second definition, common in criminal procedure and police science sources, is that arrest is the taking of a person into custody so that he may be held to answer before the courts for the commission of a crime.[36] Both of these definitions are correct within their proper context, but confusion arises when it is not clear which meaning is intended when the word "arrest" is used. Therefore, throughout this discussion "arrest" will be used in its procedural context and will refer to the step in the accusatorial criminal process where the defendant is taken into custody to be charged with the commission of a crime. The word "detention" will be used to refer broadly to any deprivation of the freedom of movement for any purpose.

The real question is whether the requirement of probable cause applies to all criminal detentions or just to arrests, that is, whether there may be a legal detention where there are no grounds for a legal arrest, and if so, under what circumstances. Although the first part of the question has been given an emphatic negative answer by some writers,[37] such an answer is too sweeping. For example, it could hardly be argued that a police officer directing traffic cannot legally detain a motorist for the purpose of expediting the safe flow of traffic. On the other hand, the requirements for a legal arrest cannot be made to disappear merely by substituting the term "detention" for "arrest."

The United States Supreme Court has not squarely ruled on whether there can be a legal detention without probable cause for arrest, but there have been hints. In *Henry v. United States*,[38] FBI agents who were investigating thefts of whiskey from an interstate terminal observed two men, who were suspects, leave a tavern and drive off in a car. The agents followed the car and observed it stopping in an alley behind a house from which the suspects carried several cartons and loaded them in the car. The agents lost the car in traffic but found it later parked near the tavern. The men again came out of the tavern, drove to the house and picked up more cartons. This time the agents succeeded in following the car and flagged it down. In the back of the car, in plain view, were cartons marked "Admiral" and, as it later turned out, containing stolen radios. The agents took the suspects to the FBI office, held them for two hours, and then, when the radios were determined

[35] See, *e.g.*, Turney v. Rhodes, 42 Ga. App. 104, 155 S.E. 112 (1930); Pratt v. Gross, 263 Ky. 521, 92 S.W.2d 788 (1936); 1 Kinkead, Torts § 215 (1903). However, the *Restatement of Torts* uses "imprisonment" in describing deprivation of liberty of movement, using "arrest" in the criminal procedure sense. See Restatement, Torts §§ 35, 112 (1934).

[36] See, *e.g.*, *In re* L ——, 25 Ohio Op. 2d 369, 194 N.E.2d 797 (Juv. Ct. 1963); State v. Beckendorf, 79 Utah 360, 10 P.2d 1073 (1932); Germann, Day & Gallati, Introduction to Law Enforcement 161 (1962).

[37] See, *e.g.*, Foote, *The Fourth Amendment: Obstacle or Necessity in the Law of Arrest?*, in Police Power and Individual Freedom 29 (Sowle ed. 1962).

[38] 361 U.S. 98 (1959).

to have been stolen from interstate shipment, formally arrested them. The Court stated that "when the officers interrupted the two men and restricted their liberty of movement, the arrest, for purposes of this case, was complete"[39] and held that there was no probable cause for arrest at that time. However, this statement is considerably weakened by the fact that the prosecution had conceded that the arrest took place at the time that the car was stopped and did not argue the point on appeal,[40] and the Court limited its view of the facts to the interpretation that the agents intended to make the arrest and to search the car when they signaled the defendants to stop.[41] Mr. Chief Justice Warren and Mr. Justice Clark, dissenting,[42] ignored the concession of the prosecution and argued that the suspicious activities warranted the stopping of the car and the sighting of the packages gave probable cause for an arrest.

One year later, an attempt was made by the United States to have the Court rule directly on the issue.[43] This time the Government argued at length that "the Fourth Amendment does not require 'probable cause' for the limited detention that may be involved in stopping a person for brief questioning in the course of investigation.... Both [the fourth amendment] ... and the common law requirement of probable cause for arrest were concerned ... only with a 'seizure' of the person of a nature implied by the term 'arrest' as that was understood at common law—*i.e.*, the taking of a person into custody for an indefinite period to hold him to answer for a crime."[44] However, the facts of when the arrest occurred were not clear in the record, apparently because the case had been decided below on the strength of the "silver platter doctrine" which was discarded by the Court in *Elkins v. United States*[45] on the same day that the instant case was decided. Therefore, the Court remanded for a further finding of fact as to whether the evidence was observed during a short detention for purposes of a routine interrogation or whether it was seized as the result of an arrest for which there was clearly no supporting probable cause. The Court, in this action, at least recognized the *possibility*

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[39] *Id.* at 103.

[40] *Ibid.*

[41] The court in People v. Cowman, 223 Cal. App. 2d 109, 35 Cal. Rptr. 528 (Dist. Ct. App. 1964), a case involving the stopping of a car for investigation, stated: "Thus, it is clear that . . . [*Henry v. United States*] did not reach the question as to what constitutes reasonable cause to stop an automobile for purposes of investigation where there is no preconceived intent either to arrest the occupants or to conduct a search thereof." *Id.*, 532 Cal. Rptr. at 532.

There is a basic potential fallacy in comparing the procedures of specialized federal officers with those of regular police. The FBI agents, in *Henry*, for example, were investigating specific suspects for a specific crime. This differs considerably from the situation of the regular police officer who is responsible for the security of his area and who observes suspicious activity. He does not know if a crime is being committed or not. He does not know who the suspicious persons are. He cannot bide his time while he gathers evidence and then obtain an arrest warrant. His job involves more than the gathering of facts for a government attorney—he is duty bound to protect the community. If a crime is being committed or about to be committed, he must act immediately, and he cannot act unless he knows what is occurring.

[42] 361 U.S. at 104.

[43] Rios v. United States, 364 U.S. 253 (1960).

[44] Brief for the United States, pp. 29–31, Rios v. United States, 364 U.S. 253 (1960), as quoted in PAULSEN & KADISH, CRIMINAL LAW AND ITS PROCESSES 834 (1962).

[45] 364 U.S. 206 (1960).

that persons may be legally detained temporarily for purposes of interrogation where there is no probable cause.[46]

The lower federal courts are split on the question. For example one district court case,[47] which involved the famous "Appalachian Conspiracy," upheld the police station interrogation, for periods of up to thirty minutes, of all persons leaving a gathering of known underworld leaders.[48] On the other hand, the District Court for the District of Columbia held that a suspicious man carrying a record player in a pillowcase at 5:30 a.m. could be questioned but not be taken a short distance to a police call box to allow the officer to inquire whether a burglary had been committed in the neighborhood.[49] In a recent case, the Court of Appeals for the Second Circuit held, in the alternative, that a robbery suspect who was interrogated, fingerprinted, and put in a line-up over a period of nine hours was detained and not arrested and therefore the *Mallory* rule did not apply.[50]

As could be expected, the state courts also are split on the question of the legality of temporary detention without grounds for arrest. Apparently all jurisdictions recognize that a police officer, like anyone else, has the right to ask a question of a person, but there is no accord on whether the officer can order a person to stop and detain him while the officer asks questions or upon the grounds necessary to justify such detention. There is a long line of California cases upholding the right of a police officer to stop and question a person if that person had acted in such a way that a reasonable man would conclude that the public safety demands such interrogation.[51] The New York Court of Appeals recently handed down an opinion upholding a conviction for illegal possession of a pistol found as the result of the street interrogation and "frisking" of two suspicious men.[52] There the court said: "The authority of the police to stop defendant and question him in the circumstances shown is perfectly clear. . . . Prompt inquiry into suspicious or unusual street action is an indispensable police power in the orderly govern-

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[46] This case has been cited as authority for the proposition that persons may be detained for investigation. See Moore v. United States, 296 F.2d 519, 521 (5th Cir. 1961); People v. Cowman, 223 Cal. App. 2d 109, 35 Cal. Rptr. 528, 532–33 (Dist. Ct. App. 1964).

[47] United States v. Bonanno, 180 F. Supp. 71 (S.D.N.Y. 1960).

[48] The facts of the *Bonanno* detention are set out in more detail in United States v. Bufalino, 285 F.2d 408 (2d Cir. 1960). The legality of the detention was not in question in *Bufalino* but Mr. Justice Clark, in his capacity as Circuit Justice, questioned the validity of *Bonanno* and the legality of the detention there. *Id.* at 420 n.3.

[49] United States v. Mitchell, 179 F. Supp. 636 (D.D.C. 1959). The Court of Appeals for the District of Columbia has held by implication that there is no distinction between detention for investigation and arrest. Jackson v. United States, 336 F.2d 579 (D.C. Cir. 1964); Kelley v. United States, 298 F.2d 310 (D.C. Cir. 1961).

[50] United States v. Vita, 294 F.2d 524 (2d Cir. 1961), *cert. denied*, 369 U.S. 823 (1962). The court first held, in the other branch of the alternative holding, that there was no detention because the defendant consented to go to headquarters and remained there of his own volition. In a less extreme case involving the temporary street detention of persons engaged in suspicious activity, the Circuit Court of Appeals for the Fifth Circuit upheld the right to detain for interrogation, citing Rios v. United States, 364 U.S. 253 (1960). Moore v. United States, 296 F.2d 519, 521 (5th Cir. 1961).

[51] See, *e.g.*, People v. Mickelson, 59 Adv. Cal. 465, 380 P.2d 658, 30 Cal. Rptr. 18 (1963); People v. Blodgett, 46 Cal. 2d 114, 293 P.2d 57 (1956); People v. Martin, 46 Cal. 2d 106, 293 P.2d 52 (1956).

[52] People v. Rivera, 14 N.Y.2d 441, 201 N.E.2d 32, 252 N.Y.S.2d 458 (1964).

ment of large urban communities."[53] The court clearly distinguished between arrest and detention for purposes of making an investigation and stated that "the ground upon which the police may make the inquiry may be less incriminating than the ground for an arrest for a crime known to have been committed."[54]

The existence of a common law right to detain for investigation is not clear in the other states. For example, in Oklahoma a 1958 case[55] seems to hold by implication that officers, acting on a "tip," cannot stop a motorist to determine if he is driving under the influence of alcohol, while a 1964 case[56] holds that officers can stop a car containing suspicious men and make an arrest based on the behavior of the occupants during the interrogation. A 1932 West Virginia case[57] approved the use of a roadblock to check drivers' licenses and registration certificates, but it is not clear whether such a tactic is authorized only in an area where there has been either a large number of robberies or the commission of a particular crime. A group of states has recognized the right of peace officers to make inquiry but apparently has not specifically recognized the right to detain if the person questioned does not consent.[58] However in most of these cases the issue was not clearly raised by the facts. Research has not yielded a single state jurisdiction in which it has been clearly held, in a case still having binding effect, that peace officers cannot temporarily detain a person unless they have probable cause to make an arrest.

The Utah Supreme Court has had only one occasion to address itself to the problem. In *Wendelboe v. Jacobson*,[59] a false arrest, assault and battery, and malicious prosecution case, the court upheld the lower court's jury instruction that, if the defendant officers had any reasonable suspicion that the plaintiff might be committing or about to commit any public offense whatever, they had the authority and the duty to approach him and ask him what he was doing at that time and place "and no person has any right whatever to resist, interfere with, obstruct or delay a police officer in the exercise of this duty."[60] Plaintiff was sitting in a car, with its lights out and motor running, parked at the side of the street just east of the business district of Salt Lake City at three o'clock in the morning, when he was approached by the three defendants who were officers of the Salt Lake City Police. An officer asked plaintiff for his driver's license, and plaintiff gave him a temporary driving permit which did not include a description of the holder. The officer requested further identification and the registration certificate

[53] *Id.* at 444, 201 N.E.2d at 34, 252 N.Y.S.2d at 461.

[54] *Id.* at 445, 201 N.E.2d at 34, 252 N.Y.S.2d at 461.

[55] Shirey v. State, 321 P.2d 981 (Okla. Cr. App. 1958).

[56] Trusty v. State, 395 P.2d 350 (Okla. Cr. App. 1964).

[57] State v. Hatfield, 112 W. Va. 424, 164 S.E. 518 (1932).

[58] State v. Gulcznski, 32 Del. 120, 120 Atl. 88 (1922); Commonwealth v. Lehan, 196 N.E.2d 840 (Mass. 1964); State *ex rel.* Branchaud v. Hedman, 130 N.W.2d 628 (Minn. 1964); Rezeau v. State, 95 Tex. Crim. 323, 254 S.W. 574 (1923); State v. Zupan, 115 Wash. 80, 283 Pac. 671 (1929); People v. Henneman, 367 Ill. 151, 10 N.E.2d 649 (1937) (dictum).

[59] 10 Utah 2d 344, 353 P.2d 178 (1960).

for the automobile. The plaintiff refused to yield his army identification card which the officer saw among the papers through which the plaintiff was thumbing, and at that point the officer ordered the plaintiff out of his car and then ordered him to take a seat in the police car. The plaintiff became belligerent and attempted to escape, causing a melee to erupt. He was subdued, taken to jail, and charged with vagrancy, assault and battery, and resisting an officer. The criminal actions terminated in plaintiff's favor. The court interpreted these facts to justify the arrest at the time plaintiff was ordered out of the car on the ground that the failure to produce the registration was a misdemeanor,[61] although such a ground for arrest apparently did not occur to the arresting officers until they were made defendants in this action.[62] In view of this interpretation, the holding that officers have the authority and duty to interrogate suspicious persons would seem to be limited to the original request for identification and the registration certificate, and leaves unanswered the question of whether the further detention would have been justified without the rather artificially contrived[63] substantive offense of failure to produce the registration certificate.

It should be noted that section 41-1-40,[64] the statute requiring display of the registration certificate on demand, does not state upon what conditions an officer may demand the display. Section 41-1-17[65] provides that officers shall have the right to stop motorists and demand to see their drivers' licenses and registration certificates but only when the officer has a reasonable belief that the motorist is violating a motor vehicle law. The court in *Wendelboe* did not mention the vagrancy statute.[66] Therefore it can be presumed that the authority of officers to make inquiry of suspicious persons recognized in that case is based upon common law authority of peace officers. However, *Wendelboe* was a tort action, and what is recognized as a good defense to a false arrest might not be a justification for an arrest where that arrest is attacked in a criminal proceeding.[67]

The Detention Statutes

An effort has been made in some states to codify the distinction between detention for investigation and arrest and to provide for limited detention on grounds not constituting probable cause. Three states[68] have adopted the

[61] UTAH CODE ANN. § 41-1-40 (Repl. vol. 1960).

[62] Justice Henriod pointed out in his dissent: "This writer's guess is that such defense was a convenient afterthought . . . . It is significant that plaintiff was never charged with this offense . . ." Wendelboe v. Jacobson, 10 Utah 2d 344, 350, 353 P.2d 178, 182 (1960).

[63] Justice Henriod also observed in his dissent that the plaintiff was attempting to produce the registration certificate when he was ordered out of the car following his refusal to give the officer his army identification card. *Ibid.*

[64] UTAH CODE ANN. § 41-1-40 (Repl. vol. 1960).

[65] UTAH CODE ANN. § 41-1-17 (Repl. vol. 1960).

[66] UTAH CODE ANN. § 76-61-1 (1953).

[67] See discussion p. 624 *infra.*

[68] DEL. CODE ANN. tit. 11, § 1902 (1958); N.H. REV. STAT. ANN. § 594:2 (1953); R.I. GEN. LAWS ANN. § 12-7-1 (1956).

Uniform Arrest Act[69] which provides that a peace officer may stop any person abroad who he has reasonable grounds to suspect is committing, or is about to commit, a crime, and may demand his name, address, business abroad, and where he is going.[70] In the event that the person fails to give the required information to the satisfaction of the officer, he may be detained for a period not exceeding two hours, which detention will not be considered or recorded as an arrest. The act further provides that the officer may "frisk" the person so detained for a weapon if the officer has reasonable grounds to believe he is in danger.[71]

Although these statutes have been in effect for over twenty years and have been assailed on constitutional grounds in the supreme courts of two of the states, the constitutionality of the detention provision of the Uniform Arrest Act remains in doubt. In *De Salvatore v. State*,[72] a 1960 Delaware case, the act was challenged upon the ground that it permitted an arrest without probable cause. The court first stated that the act "purports to govern, not arrests for crime . . . but detentions of persons in the course of the investigating of crime. Such police practice has long been recognized as valid by the courts when kept within reasonable bounds. . . . This court, also, has upheld the investigatory power of the police to detain for questioning."[73] The court then proceeded to emasculate the act by stating: "[W]e think appellant's attempt to draw a distinction between an admittedly valid detention upon 'reasonable grounds to believe' [i.e., probable cause] and the requirement of [the act] . . . of 'reasonable ground to suspect' is a semantic quibble. . . . In this context, the words 'suspect' and 'believe' are equivalents."[74] Although this was a poor case to decide the issue because there was probable cause to support the detention as an arrest,[75] it is difficult to believe that the Delaware court actually thought that the sole purpose of the detention provision of the Uniform Arrest Act was to allow officers to hold for two hours persons they could legally arrest. Perhaps the court believed that only this reduction of the heart and soul of the detention provision to a semantic quibble dreamed up by the appellant's lawyers would save the act, although this would seem inconsistent with the earlier statement as to

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[69] The Uniform Arrest Act was drafted in 1939 by a committee of the Interstate Commission on Crime. The act, as drafted, is set out with comments in Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315 (1942).

[70] UNIFORM ARREST ACT § 2. This section is reproduced in Warner, *supra* note 69, at 344; PAULSEN & KADISH, CRIMINAL LAW AND ITS PROCESSES 832 (1962).

[71] However, the act does not authorize a general search of a person detained. State v. Scanlon, 84 N.J. Super. 427, 202 A.2d 448 (Super. Ct. 1964) (interpreting Delaware statute).

[72] 52 Del. 550, 163 A.2d 244 (1960).

[73] *Id.*, 163 A.2d at 248.

[74] *Id.*, 163 A.2d at 249.

[75] The court stated: "Not only did the appellant commit a violation of the Motor Vehicles Laws (crossing the grass plot) in the presence of the officers, but upon talking to him the officers had more than reasonable grounds to believe he had committed another violation in their presence (driving under the influence of liquor). We think the officers could have exercised their authority at that time . . . and have placed the appellant under arrest." *Id.*, 163 A.2d at 249. Apparently the officers were using the detention provision for delay while they gathered evidence against a person whom they could have arrested. This would seem to be a misuse of a provision designed to assist the police in investigating to determine whether a crime had been committed.

the acceptability of the police practice of detaining persons for questioning.[76] One year later the Delaware court, citing *De Salvatore,* once again upheld the act but still without clearly defining what grounds are required for detention.[77]

The history of the act in the Rhode Island Supreme Court is no more enlightening. In *Kavanagh v. Stenhouse,*[78] the court clearly distinguished between "detention" and "arrest" and held that the legislature might set a lower standard for limited detention than that required for common-law-type arrest.[79] However the court stated that the requirement for detention under the Rhode Island version of the act was the same as under the Delaware version and quoted the language from *De Salvatore,* including the "semantic quibble," upholding the constitutionality of the act.[80] Further confusion was added by the case of *State v. Mercurio.*[81] In that case, the same justice who wrote the opinion in *Kavanagh,* held for the court that the detention of defendants based upon another provision of the Rhode Island arrest laws,[82] which allow arrest for a misdemeanor committed in the presence of an officer even if the officer does not have a reasonable basis for his belief at the time, was unconstitutional. Defendants had been taken to the police station and interrogated because the officers had information that the car in which they were riding was being used in a gambling operation. After an unspecified period they were released and later arrested under warrants based on the information obtained during the interrogation. The opinion does not mention the detention provision[83] of the Uniform Arrest Act which would seem to justify the detention for interrogation if the standard is actually less than probable cause. Perhaps there is some other reason the detention provision was not used for a justification,[84] but its absence raises some question as to whether the court believed it was constitutionally applicable.

The New York Legislature recently enacted into law section 180-a of the Code of Criminal Procedure, commonly known as the "Stop and Frisk Law" which allows a police officer to stop a person in a public place, demand that he identify himself and explain his actions if the officer "reasonably suspects" that such person has committed, is committing, or is about to

[76] One writer, Ronayne, *The Right To Investigate and New York's "Stop and Frisk" Law,* 33 Fordham L. Rev. 211, 217 (1964), argues that *De Salvatore* did not hold that the detention provision required the same quantum of suspicion as is required for arrest — that a careful reading of the case indicates that the court was speaking of a kind of "probable cause" for detention which is not necessarily the same as arrest "probable cause." However, such a reading would seem to require considerably more care than the court exercised in writing the opinion.

[77] Cannon v. State, 53 Del. 284, 168 A.2d 108 (1961).

[78] 174 A.2d 560 (R.I. 1961), *appeal dismissed,* 368 U.S. 516 (1962).

[79] *Id.,* 174 A.2d at 563.

[80] *Ibid.*

[81] 194 A.2d 574 (R.I. 1963).

[82] R.I. Gen. Laws Ann. § 12-7-3 (1956).

[83] Uniform Arrest Act § 2; R.I. Gen. Laws Ann. § 12-7-1 (1956).

[84] For example, perhaps the defendants were held for over two hours, although there is no mention of such fact in the opinion. Another possibility is that the officers intended to arrest rather than detain in which case the detention provision would not be applicable. Wilson v. State, 10 Del. 37, 109 A.2d 381 (1954).

commit a felony or serious misdemeanor.[85] The statute also authorizes the officer to "frisk" such an individual for weapons if the officer "reasonably suspects" that his life is in danger. The statute does not state the consequences if the detained person remains silent and refuses to cooperate, although it can be presumed that any active physical resistance could be punished as interfering with an officer.[86] Since the passage of the law, the Court of Appeals upheld a detention and frisk without probable cause which occurred before passage of the act.[87] The case leaves little doubt that the court believes that the "Stop and Frisk Law" is constitutional.[88]

The Model Penal Code rejects the temporary-detention approach to the problem, adopting instead a substantive offense of "Loitering or Prowling" which is akin to the venerable crime of vagrancy. The section provides:

> A person commits a violation if he loiters or prowls in a place, at a time, or in a manner not usual for law-abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity. Among the circumstances which may be considered in determining whether such alarm is warranted is the fact that the actor takes flight upon appearance of a peace officer, refuses to identify himself, or manifestly endeavors to conceal himself or any object. Unless flight by the actor or other circumstance makes it impracticable, a peace officer shall prior to any arrest for an offense under this section afford the actor an opportunity to dispel any alarm which would otherwise be warranted, by requesting him to identify himself and explain his presence and conduct. No person shall be convicted of an offense under this Section if the peace officer did not comply with the preceding sentence, or if it appears at trial that the explanation given by the actor was true and, if believed by the peace officer at the time, would have dispelled the alarm.[89]

This section states, in the careful and precise language of the American Law Institute, what the archaic and misleading language of the vagrancy laws has been interpreted to mean within the modern context. The vagrancy law subsection in point which is to be found in some form in thirty-eight states provides typically: "Every person who wanders about the streets at late or unusual hours of the night, without any visible or lawful business is a vagrant."[90] Both the Utah Code[91] and the Salt Lake City Ordinances[92]

[85] For additional comments on this statute see Siegel, *The New York "Frisk" and "Knock-Not" Statutes: Are They Constitutional?*, 30 BROOKLYN L. REV. 274 (1964); Legislation, 38 ST. JOHN'S L. REV. 392 (1964).

[86] See N.Y. CODE CRIM. PROC. § 102.

[87] People v. Rivera, 14 N.Y.2d 441, 201 N.E.2d 32, 252 N.Y.S.2d 458 (1964). Discussed *supra* at pp. 600–01.

[88] The court was careful to point out that the incident involved in the case occurred prior to the effective date of the statute, and that the validity of the statute was not in question. Nevertheless, if an officer can detain for investigation without a statute, a fortiori he can do it with the authorization of a statute. The only question left is the precise standards of the statute and it would seem that this would be a matter of interpretation.

[89] MODEL PENAL CODE § 250.6 (Proposed Official Draft 1962).

[90] See, *e.g.*, ARIZ. REV. STAT. ANN. § 13-991 (1956); MONT. REV. CODES ANN. § 94-35-248 (1947); N.Y. CODE CRIM. PROC. § 887.

[91] UTAH CODE ANN. § 76-61-1 (1953).

[92] SALT LAKE CITY, UTAH, REV. ORDINANCES § 32-1-52(6) (1955).

contain such language. However, the vagrancy laws have been given a very restricted meaning by the courts in which their constitutionality has been questioned. It is clear from these decisions that "without visible or lawful business" means the presence of an unlawful purpose which is evidenced by the circumstances and behavior of the vagrant.[93] These statutes do not give an officer the right to compel a person to account for himself merely because he is found wandering abroad at a late or unusual hour.[94] This interpretation has been adopted by the Utah Attorney General in an advisory opinion given on request of the Salt Lake City Prosecutor.[95]

Nevertheless, the vagrancy law gives an investigating officer a useful tool. While it might be difficult to prove beyond a reasonable doubt that a defendant's purpose for being abroad is unlawful, all that is needed to justify an arrest is reasonable ground to believe that that is what his purpose was. Hence, an officer may arrest any person found abroad at late and unusual hours in circumstances that give cause to the officer to believe that he has an unlawful purpose unless that person can dispel that belief by explaining away the suspicious circumstances.

The Problem of Consent

By definition, in order to have a detention there must be restraint placed upon the freedom of movement. However, it is clear that such restraint need not be physical in nature; it is enough that the detained person submitted to authority or threat.[96] The detained person must be aware of the restraint[97] and, hence, in this respect the existence of the restraint is subjective. However, such awareness must be reasonable; there is no detention where a person unreasonably believes he is being restrained.[98]

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[93] *E.g.*, Dominguez v. City & County of Denver, 147 Colo. 233, 363 P.2d 661 (1961); Beail v. District of Columbia, 82 A.2d 765 (D.C. Munic. Ct. App. 1951), *rev'd on other grounds*, 201 F.2d 176 (D.C. Cir. 1952); State v. Grenz, 26 Wash. 2d 764, 175 P.2d 633, *appeal dismissed*, 332 U.S. 748 (1947). Two courts, refusing to save statutes which outlawed loitering by giving them an interpretation requiring criminal purpose, have declared the laws unconstitutional. Territory v. Anduha, 31 Hawaii 459 (1930); City of Akron v. Effland, 112 Ohio App. 15, 174 N.E.2d 285 (1960).

[94] Dominguez v. City & County of Denver, *supra* note 93; Beail v. District of Columbia, *supra* note 93. Vagrancy laws are exceedingly unpopular with legal writers. However, most of the criticism is directed at those provisions which are aimed at the poor and homeless and are unrelated to the instant provision. See, *e.g.*, Hall, *The Law of Arrest in Relation to Contemporary Social Problems*, 3 U. CHI. L. REV. 345 (1936). However, some writers, relying on the literal language of the statutes and a good imagination also soundly condemn the specific section because they believe it outlaws wandering the streets per se. For example, Mr. Justice Douglas, after setting out the language of the section of the District of Columbia Code, says: "I have known judges and lawyers who, afflicted with insomnia, have wandered the streets at night." Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1, 4 (1960). However, Mr. Justice Douglas seems to approve of developments in England where "criminal intent of some character, not mere idleness and destitution, must be present." *Id.* at 11. However, such is precisely the law in the District of Columbia as well. Beail v. District of Columbia, *supra* note 93.

[95] [July 1962–June 1964] UTAH ATT'Y GEN. BIENNIAL REPORT 97.

[96] *E.g.*, Hoppes v. State, 70 Okla. Crim. 179, 105 P.2d 433 (1940); Murphy v. State, 194 Tenn. 698, 254 S.W.2d 979 (1953).

[97] *E.g.*, Harrer v. Montgomery Ward & Co., 124 Mont. 295, 221 P.2d 428 (1950); State v. Williams, 237 S.C. 252, 116 S.E.2d 858 (1960).

[98] Pollack v. City of Newark, 147 F. Supp. 35 (D.N.J. 1956), *aff'd*, 248 F.2d 543 (3d Cir. 1957), *cert. denied*, 355 U.S. 964 (1958); Hoffman v. Clinic Hosp., 213 N.C. 669, 197 S.E. 161 (1938).

The difficult problem in determining whether a detention occurred in a police-citizen encounter is in determining whether the citizen willingly consented to accompany, or stop and talk with, the officer or whether he reasonably submitted to authority or threat. Such a determination has much in common with the problem of consent to a search made without a warrant. The federal courts, led by the Supreme Court, have been very skeptical of police claims of consent in search cases and have imposed that view upon the states.[99] For example, even where consent is expressed in unequivocal language, successful searches have been held illegal because no sane man would freely consent to a search that he knows will produce incriminating evidence.[100] In order to establish consent for a search without a warrant, it has become mandatory for the prosecution to prove that the subject was aware that he was free to refuse consent without adverse consequences.[101]

However, it should be borne in mind that there is a significant difference in the effect that consent has upon a search without a warrant and the effect it has upon a potential detention. In the law of search and seizure, consent must be shown to justify what is otherwise an unconstitutional act — a search without a warrant.[102] On the other hand, in arrest law, it is the lack of consent — that is, the presence of coercion — which must be shown to establish that a detention occurred.[103] This is more than a procedural difference, affecting only the allocation of burden of proof; it has substantive effect on the delineation of police power and depends for its justification on three basic policy premises. Those premises are: (1) that it is in the public interest that police officers be informed of what is transpiring in the community; (2) that it is essential for police officers to contact citizens in order to become informed; and (3) that such contact, in the absence of coercion, does not constitute a significant infringement of individual liberty.

The first two of these premises would seem to be readily apparent to anyone familiar with the techniques of law enforcement. The third premise, however, can well be described as the root controversy of the whole question of field interrogation. In support of this premise, it can be argued that police officers are, after all, people, and that contact and communication between people are completely normal — no one can be expected to be protected from it, at least when he goes into public. The law-abiding citizen should be expected to have a desire, if not a duty, to cooperate with the police in protecting his community and therefore should not be annoyed by reasonable contact with the police. Contact with other governmental officials, such as census takers, health officials, tax assessors, and so forth, is tolerated even though the

[99] See, *e.g.*, Stoner v. California, 376 U.S. 483 (1964); Kamisar, *Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 MINN. L. REV. 1083 (1959); Note, 28 U. CHI. L. REV. 664 (1961); Note, *Effective Consent to Search and Seizure*, 113 U. PA. L. REV. 260 (1964); Note, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U. CHI. L. REV. 664 (1961).

[100] Channel v. United States, 285 F.2d 217 (9th Cir. 1960); Higgins v. United States, 209 F.2d 819 (D.C. Cir. 1954).

[101] Channel v. United States, 285 F.2d 217 (9th Cir. 1960); Judd v. United States, 190 F.2d 649 (D.C. Cir. 1951).

[102] Judd v. United States, *supra* note 101.

[103] *E.g.*, Rezeau v. State, 95 Tex. Crim. 323, 254 S.W. 574 (1923).

purpose of such contact might not be as essential to the fundamental well-being of the community as is contact with the police.

On the other hand, suspicion of and resentment toward the police lie deep in our heritage and have been reinforced by occasional abuse of power by police officers, especially toward certain population groups. To many people, mere official inquiry constitutes an invasion of privacy, whether or not such inquiry is accompanied by coercion.

However, it is apparent that the prevailing view is that, in the absence of a showing of coercion, contact between police and citizen is normal and legitimate.[104] Therefore, when there is contact between the police and the citizen, there is no reason to assume, in the absence of any showing of coercion, that there was an unreasonable interference with constitutional rights. Unlike a warrantless search, such contact does not require the police to take exceptional care to acquire express consent from the person contacted in order to avoid a detention of that person. They need only prevent the contacted person from reasonably concluding that he is under restraint and not free to choose whether to cooperate or not.

The relatively few cases on the subject do not yield a consensus on what will lead a person to reasonably conclude that he is under restraint. The District Court for the District of Columbia has held a detention occurred where a juvenile was asked to come to headquarters to try to "clear" a friend and he agreed.[105] The court seemed impressed by the testimony of the officer that no juvenile had ever refused to agree to such a request and concluded that the juvenile must have felt that he was under the power of the officer. Such a conclusion would appear to be extreme and it is doubtful that courts of other jurisdictions would take a similar position since, generally, the fact that a person is motivated to cooperate in order to allay suspicion is not considered to be submission to authority, and several cases have held that invitations to come to headquarters for an interview do not result in detention.[106] However, threats of prosecution for an unrelated crime have been held to be coercive.[107]

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[104] See Remington, *The Law Relating to "On the Street" Detention, Questioning and Frisking of Suspected Persons and Police Arrest Privileges in General*, in POLICE POWER AND INDIVIDUAL FREEDOM 11, 14 (Sowle ed. 1962). Even Professor Foote, who is one of the most adamant opponents of legalizing detention without probable cause, agrees that inquiry without coercion is proper.

> As has been noted, the police today can question a pedestrian on the streets or go to a house to request an interview with a suspect. They can solicit a confession or statement, bluff the suspect by pretending that they already know he is carrying contraband, or take advantage of the mere opportunity to ask questions to induce the suspect to tip his hand. In England the police frequently invite a suspect to come to the police station for an interview, a practice of which American police apparently have not taken advantage.

Foote, *The Fourth Amendment: Obstacle or Necessity in the Law of Arrest?*, in POLICE POWER AND INDIVIDUAL FREEDOM 29, 34–35 (Sowle ed. 1962).

[105] United States v. Smith, 31 F.R.D. 553 (D.D.C. 1962).

[106] Hart v. United States, 316 F.2d 916 (5th Cir. 1963); United States v. Vita, 294 F.2d 524 (2d Cir. 1961); Pollack v. City of Newark, 147 F. Supp. 35 (D.N.J. 1956), *aff'd*, 248 F.2d 543 (3d Cir. 1957), *cert. denied*, 355 U.S. 964 (1958); Rezeau v. State, 95 Tex. Crim. 323, 254 S.W. 574 (1923).

[107] Rhodes v. Jordan, 157 So. 811 (La. App. 1934).

Whether compliance with a police request was voluntary is primarily a factual question and the answer will depend on a variety of factors which will be discussed in more detail in connection with specific fact situations in the following section.

III. Salt Lake City Police Practices

The purpose of the study of police practices in Salt Lake City was to provide a basis for the evaluation of the current state of the law and the various alternatives in light of law enforcement problems of the real world. Interviews were held with police officials on all levels, with prosecutors, and with judges. However, the major emphasis was placed upon direct observation by the writers of this note who accompanied members of the detective and uniform patrol divisions while on duty. The cooperation of the Salt Lake City Police Department was wholehearted. The freedom of movement given to the observers not only greatly facilitated the study but also indicated an open-society approach to police work in the best libertarian tradition.

The field study of the uniform patrol extended over a period of eight weeks. During that period the observers would appear at the police station, at a time and on days of their choosing, and select an officer to accompany. The patrolmen were given no instructions by the department other than that the observers had authorization to accompany them everywhere including crime scenes, were responsible for their own safety, and were not to be relied upon for assistance. A total of 180 man-hours were spent on patrol, mostly late at night and in the higher crime-rate areas of the city.

The study of the detective division was less extensive because, by the nature of the work, the members of this division are more rarely confronted with borderline arrest decisions which must be made under pressure in a very short time period. The detective's normal function is to investigate and "clear" the crime after receiving the initial report from the uniform patrol. Consequently, most suspects are apprehended by the detectives only after the detectives have acquired sufficient evidence to clearly support an arrest and have obtained an arrest warrant. A total of twenty man-hours was spent accompanying members of the detective division on duty.

No attempt was made to utilize statistical sampling methods to collect empirical data regarding the activities of the Salt Lake Police Department. Rather, the study technique was designed to familiarize the observers with the operations and to enable them to locate problem areas in the application of the law in the field. At first, the officers to be accompanied were selected at random. However, as the study progressed and the observers became acquainted with the members of the patrol and their reputations, selection was made with a view toward obtaining as large a quantity of reliable information as possible. Hence, although time was spent with officers of all types, emphasis was placed upon observing those officers who were the most aggressive and who did more than just respond to orders from the dispatcher. It was noted that such officers not only worked harder and made more contacts, but were more professionally confident than average, and hence it was be-

lieved that they would act more normally under observation. Each observer would ordinarily ride alone with one officer which enabled the observer to establish some rapport with the officer. Although a little suspicion on the part of some of the officers was noted at first, this wariness dissipated within a short time and the observers were accepted as fixtures of the operation. Care was taken to avoid conveying to the officer any opinion or judgment of the observer which might affect the officer's performance under observation. Curiosity was expressed about all phases of police practices in order to de-emphasize questions concerning arrest and detention.

Since the study was not based upon random sampling, no statistics will be presented in this note. Rather, observed situations will be set out which the observers believe to be typical and illustrate problems of detention and arrest which arise in the field.

Field Interrogation

A police practice of great interest to this study is field interrogation or "the shake down" as it is called by the patrolmen. Although field interrogations are sometimes made of suspects in connection with the investigation of a specific crime, they are ordinarily conducted for crime detection, crime prevention, and general intelligence purposes. Information obtained from a person interrogated is often recorded on a "field card"[108] and circulated within the department. This information is valuable not only in the rare instance where a crime is later reported and the person interrogated becomes a likely suspect but is also valuable in keeping track of the "criminal element." It is, of course, of great interest to the police to know, for example, which burglars are in town, who their associates are, and which vehicles they are using.

Most field interrogations are made by members of the Uniform Patrol Division at "late and unusual hours" of the night.[109] The classes of persons subject to interrogation vary with the officer on patrol and with the location. Some officers only interrogate "known criminals"[110] or those persons whose

[108] The field card has blanks for the following information: name, nickname, address, phone number, date and time of occurrence, driver's license number, sex, descent, age, height, weight, hair, eyes, complexion, date of birth, marks and scars, clothing worn, year and make of car, body type, color of car, license number and year, business address or school, names of persons with suspect, reason for interrogation, and disposition. A box is checked on the card indicating whether the suspect is a driver, passenger or pedestrian.

Some officers keep a carbon copy of the field card for their own files.

[109] This is because many interrogations are made with vague reliance upon the vagrancy law and because the late hour often makes suspicious what in daytime would appear completely normal. What is a "late and unusual hour" varies with the area. In an area of taverns which close at 1:00 a.m., midnight might not be a late hour, while in an area of medical clinics it might very well be.

[110] The term "known criminal" is used to refer to those persons the police believe to be habitually engaged in some sort of criminal activity. Such belief may be based upon knowledge of a series of convictions or prosecutions, personal experience derived from apprehending the individual in the act, reports from law enforcement associations or fellow officers, rumors and tips from informants, or inferences drawn from reports that the individual has been associating with other "known criminals." One such person has solidified his reputation by giving his occupation as burglar whenever asked, even when being booked at the jail.

The term will be used in this note as defined above although it is recognized that such a term conflicts, at least semantically, with the presumption of innocence.

actions are highly suspicious or who have committed some offense in the presence of the officer. Others question everyone on the street at a late hour except those persons the officer knows or who are obviously law-abiding citizens. Motorists are generally not stopped unless they are known criminals or there is something suspicious about the manner or place in which they are driving.

The manner in which the interrogation is conducted also varies with the officer and the circumstances. The officers accompanied were always courteous but their technique varied from a thinly veiled command to take a seat in the patrol car to a request for information phrased in the manner of a tourist asking for road directions. However, most requests were in the gray area between — neither a command nor a request which could be clearly refused.[111] Again, in the few instances observed where the right of the officer to the information was questioned, the procedure taken would vary with the personality of the officer and the attitude of the person questioned. One officer accompanied would say: "That is your right if you wish, but we would sure appreciate your cooperation" and then launch into a speech about the necessity for interrogation and the civic duty of the citizen. Other officers would bluff the objector into cooperating by citing the vagrancy law and implying that the objector was required by that law to answer.

The interval required for the interrogation would vary from a few seconds to several minutes. Delay would sometimes be caused by a radioed request to the dispatcher to determine if there were any arrest warrants oustanding for the person being interrogated. On one observed occasion two men were detained for over twenty minutes because of a delay in the records department and heavy radio traffic.

Thus, it can be seen that in practice each field interrogation may involve any combination of a number of variable factors having legal significance as to whether a detention took place and whether it was legal.

Many field interrogations are made in lieu of arrest, that is, where an arrest would be clearly justified. Here the interrogation serves a purpose other than general intelligence because it results in a record, for police use, of the violation. For example:

> *Situation 1.* The officer observed boys who appeared to be underage drinking beer in a park on Sunday afternoon. They were asked for identification which, when given, confirmed the fact that they were underage. They were told to take a seat in the patrol car and the officer filled out a field card on each one. They were warned that they would be brought before the juvenile court if they were caught drinking again and then they were released.

Although this action might be disapproved on the ground that it was an exercise of "judicial discretion" by a mere policeman,[112] it could hardly be

[111] For example: "Do you have any identification on you?" or, "Would you take a seat in the back of the car for a minute?" or, "Could you come here for a minute? We would like to talk to you."

[112] See Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543 (1960).

considered an illegal detention since there were grounds for a legal arrest for a misdemeanor committed in the presence of the officer.

A slight variation of the above field-carding-in-lieu-of-arrest occurs where the officer stops a car because of a traffic violation, decides not to give a ticket but makes out a field card on the occupants of the car. This differs from the first situation in that the detention for interrogation is not really in lieu of the arrest because it is made for a different reason from that which would be justification for arrest. For example:

Situation 2. A car was observed speeding through a residential district at 3:00 a.m. and was stopped for that offense. On closer inspection it was observed that the car was loaded with large metal castings. When asked about the castings the driver gave an extremely vague answer. The officer invited him to take a seat in the patrol car and then radioed for warrant information with negative results. Another patrolman who had overheard the radio message came on the air with a request that the driver be field-carded, presumably because he was known by that officer to be a suspected burglar. The field card was made and the driver released without a citation for the traffic offense.

Here it is difficult to justify the detention on the grounds that the officer could have made an arrest for speeding because the detention was for a reason unrelated to that violation. This differs, also, from the procedure where a suspected criminal is actually arrested for one crime to allow the police to hold him for investigation for another more serious crime.[113] In the instant situation, the officer stopped the car with the expressed intent of giving a traffic violation citation, abandoned that intent, and then decided to detain the driver to determine if he was a burglar. Under these circumstances it would seem that the detention, from the time the officer asked the driver to take a seat in the patrol car, would have to stand on its own merit, based upon the information the officer had at that time. It is noteworthy that the officer involved expressed the opinion that the traffic violation could not be used to justify the detention for interrogation about the castings.

The classic detention for field interrogation, the type contemplated by the various detention statutes, occurs where the officer observes, or is informed of, a person whose actions raise an inference that he is committing, or about to commit, a crime and the officer questions him to determine if there is probable cause for an arrest. For example:

Situation 3. While making a routine patrol of an exclusively commercial and heavily burglarized area at 3:20 a.m., the officer observed an automobile containing two men come from behind an unlighted business establishment and drive off down an arterial. The car was signaled to stop and approached. The occupants explained that they were the

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[113] The latter device is not looked upon with favor by the courts. See, *e.g.*, Dukes v. State, 109 Ga. App. 825, 137 S.E.2d 532 (Ct. App. 1964), where the court said: "Illegal detention . . . [for some inconsequential misdemeanor or ordinance violation merely as a colorable device in connection with investigation procedure] constitutes a flagrant violation of law by the very persons sworn to uphold it, and renders the entire procedure from arrest a trespass ab initio." *Id.*, 137 So. at 535 (dictum).

> crew of an interstate diesel rig and had left the truck behind the building after arriving from Wyoming. The officer accepted this explanation without demanding identification or further corroboration since the truck they described had been observed fifteen minutes earlier pulling into the area. The men were thanked and released.

Although this interrogation, except for an exchange of pleasantries and small talk at the conclusion, only lasted a matter of seconds, there can be no question but that a detention took place. The use of a red spotlight to signal the suspect car to stop constitutes a command which cannot legally[114] or safely be ignored. However, it was the fact that an automobile was involved which necessitated the detention, since a pedestrian under the same circumstances could probably have been approached and cleared of suspicion without the necessity for restraint of any kind.

However, suspicion is sometimes not so easily dispelled and it becomes necessary to detain the suspicious party after the initial inquiry. For example:

> *Situation 4.* A shabbily dressed man was observed peering into the window of a late-model automobile parked in front of a cheap hotel at 2:30 a.m. On closer observation he was seen to be pulling on a pair of gloves. The officer circled the block and, upon reapproaching the scene, observed the suspect in the shadows at the entrance of the alley. When questioned about his behavior, the suspect stated that he had just arrived from New Mexico and was looking for his brother. He claimed that he thought that the car might belong to his brother who was supposed to be staying at the hotel. He was asked to accompany the officer into the hotel where — to the surprise of the observer as well as the officer — his brother was found and proved to be the owner of the car. The detention in this instance lasted about ten minutes.

The circumstances surrounding the suspect when he was first approached, coupled with the seemingly implausible explanation which he gave, would seem to come at least close to providing probable cause to believe a felony was being attempted. If the suspect had refused to accompany the officer into the hotel, he probably would have been formally arrested for vagrancy which would have resulted in an awkward situation when the officer investigated further and discovered that the suspect was innocent of any wrongdoing.[115] This incident could be analyzed as, in substance, an arrest subject to a condition subsequent that, should the suspect's story be corroborated, he would be released on the spot.

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[114] SALT LAKE CITY, UTAH, TRAFFIC CODE §§ 75, 76 (rev. ed. 1965).

[115] It can be argued that it is not lawful for an officer to release an arrested person without bringing him before a magistrate. Comment, *Some Proposals for Modernizing the Law of Arrest*, 39 CALIF L. REV. 96, 115 (1951). However, such an argument relies on a much too technical application of the *Mallory* rule. It is difficult to conceptualize a right to be taken to jail, booked, required to place bail or to spend the night in jail, and taken before a magistrate to hear the officer explain that there are now no grounds for holding the prisoner. If such a right exists, most people could be expected to waive it. In Mallory v. United States, 354 U.S. 449, 455 (1957), the Court said: "The duty enjoined upon arresting officers to arraign without unnecessary delay indicates that the command does not call for mechanical or automatic obedience. Circumstances may justify a brief delay between arrest and arraignment, as for instance, where the story volunteered by the accused is susceptible of quick verification . . . ."

Many field interrogations are made where there are no suspicious cir cumstances other than the late hour, at least of a nature that would sound convincing in court.[116] For example:

Situation 5. Two men were observed driving a Cadillac up the street at 3:48 a.m. and, although the observer agreed with the officer's intuitive feeling that these were "suspicious characters," he was unable to give any specific reason for this conclusion. The car was stopped and the driver's license checked. The occupants were told that they were stopped for a routine check and they were thanked and released. The suspicious atmosphere seemed to disappear as soon as the car was approached on foot.

This situation resembles Situation 3 in that the suspects were highly mobile and there was no way to make even the most cursory examination of them without stopping the car. Under similar circumstances, a pedestrian can be checked without need of detention. For example:

Situation 6. A young man carrying a flashlight and a small box was observed walking on the sidewalk of a residential street at 2:40 a.m. The officer paced him with the patrol car and, in a conversational tone, asked him what he was doing. He replied that he was collecting night crawlers for fishing bait. The officer wished him luck and drove on.

Here, as in Situation 5, there was no need for more than a closer observation since the activity appearing suspicious from a distance became obviously legitimate upon closer inspection. The difference between the two situations is that in one the closer inspection could be made without the assertion of authority while in the other it was necessary to order the suspects to stop.

The most difficult to justify of the observed detentions are those where a person is detained and required to give information for a field card where he has done nothing unusual to raise a suspicion that his purpose in being abroad was unlawful.

Situation 7. A young man was observed walking from downtown toward a residential neighborhood at 2:20 a.m. He was stopped and asked for identification. He gave the officer a driver's license and the

Presumably the Court believed that the accused would be released immediately should his story prove true; otherwise there would be no reason to grant a delay for checking the story.

The Restatement of Torts states that the officer must immediately release a prisoner once it becomes apparent that he is innocent. Restatement, Torts § 134, comment *f* (1934).

Nevertheless, officers are hesitant to release a person once they have *formally* arrested him. They believe that such a release puts them in jeopardy of defending a false arrest action. Some of them are convinced that such a release makes them liable regardless of the legality of the arrest. Therefore, the usual practice is to delay as long as possible before putting a person under arrest when there is a possibility that more information will dispel the grounds for the arrest.

[116] Some courts recognize that what looks suspicious to the officer on patrol might get lost in translation on the witness stand. For example, in People v. Cowman, 35 Cal. Rptr. 528, 534 (Dist. Ct. App. 1964), the court said: "Experienced police officers naturally develop an ability to perceive the unusual and the suspicious which is of enormous value in the difficult task of protecting the security and safety of law-abiding citizens. The benefit thereof should not be lost because the cold record before a reviewing court does not contain all the particularized perceptions which may have been so meaningful at the scene."

officer invited him to take a seat in the back of the patrol car while the officer filled out a field card. The officer explained that this was just a routine check and that the card was for the purpose of keeping a record of who was out at late hours. The young man was released after a few minutes.

If a detention occurred in the above situation, it would be unjustified either under existing Utah law or under the various detention statutes in force in other states. The critical element in determining the legality of such a procedure would be the presence of consent. Where the officer is careful to convey to the interrogated person that he is merely requesting information and that the interrogated person is free to leave at any time, there is of course nothing unlawful about the interrogation. In most cases it apparently does not occur to the questioned person to object because the questioning is done in such a courteous manner that the only reasonable thing is to answer. The only persons observed to object in the above circumstances became cooperative when it was explained that they were not being accused of doing anything wrong and that the police were not attempting to impose a curfew. There were no observed instances where a person refused outright to cooperate.[117] According to those officers interviewed, such refusal is rare, and when it does occur, the officers do not persist, unless there is some indication that the person involved is engaged in a criminal activity.

The final basic type of field interrogation observed is the "shakedown" of known criminals under circumstances where an ordinary citizen would probably be left alone. Sometimes the known criminal propensity of the person, coupled with the circumstances, raises an inference that he is committing, or about to commit, a crime — for example, where a known burglar is seen driving a truck late at night in a frequently burglarized area. There would not seem to be any reason why the officer could not consider what he knows about a person in determining whether that person's behavior warrants investigation.[118] However, sometimes known criminals are stopped and field-carded, not because there is reasonable suspicion that they are then engaged in a criminal activity, but to gather intelligence. For example:

Situation 8. The officer observed two young women in an automobile, driving through the center of downtown at 4:30 a.m. The officer recognized the driver as a prostitute and drug addict but did not recognize the passenger. The car was stopped to determine the identity of the

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[117] However, one observer was given a demonstration which tended to prove that not all citizens are docile. An automobile, belonging to one of the most active burglars in town who is currently a resident of the penitentiary, was observed driving up a main street at well over twice the legal speed. The officer pursued, although he knew he would not be able to "clock" the offender and hence would not be able to give a traffic citation under departmental policy, because he felt it would be instructive for the observer. The subject of the chase stopped as soon as he spotted the police car in his mirror and had his driver's license out when approached on foot. The officer started into the usual lecture for violators who are going to be released with a warning but was interrupted by the subject who asked if he was under arrest. The officer said: "No, but . . . ." At this point the subject drove off, squealing his tires.

[118] Since knowledge of past criminal behavior can be used as an element of probable cause for making an arrest, *e.g.*, People v. Hollins, 173 Cal. App. 2d 88, 343 P.2d 174 (Dist. Ct. App. 1959); State v. Chronister, 353 P.2d 493 (Okla. Crim. App. 1960), a fortiori it can be used in determining whether to make an investigation.

> passenger. Field cards were made out on both women and the driver was given a traffic ticket for not having a driver's license.

Of course, some interrogations of known criminals are conducted without detention in the same manner as the checking of nocturnal pedestrians described in Situation 7; but policemen, naturally enough, tend to be more abrupt and authoritarian when speaking to persons they know to be criminals than when addressing tax-paying, honest citizens — a factor which acts to negate consent. On the other hand, some of the persons stopped because of their records were cooperative to the point of volunteering the information before it could be requested.[119]

Arrest for Misdemeanor

The limitation in the Utah statute, that arrests for misdemeanors are only authorized where the offense is committed in the presence of the arresting officer,[120] raises serious obstacles to law enforcement. As a result, officers are forced either to make use of fictions and ruses to take misdemeanants into custody or to allow persons they know are guilty to remain free to continue their mischief. One such fiction is the formal citizen's arrest, made after the officer has apprehended the offender. For example:

> *Situation 9.* An officer was dispatched at 9:30 p.m., to a specific residential address in answer to a prowler report. The officer approached the house through an alley with his car lights off and observed a man who had apparently just left the property. The man bolted when he saw the police car but was apprehended after a spirited chase. He denied doing anything wrong. He was taken back to the house whence the complaint originated where he was identified by the complainant as the man who was peeping in her window. The officer then had the complainant formally arrest the man for trespassing and sign a request to have the officer take the prisoner to jail.

There can be little doubt that the arrest occurred when the officer apprehended the suspect. The officer's intent was clearly to take the man into custody to answer for a specific crime. The later "arrest" by the complainant was a mere formality designed to put a legal arrest on the records.

In some situations the officer first attempts to persuade the suspect to return to the scene of the crime "to clear himself." For example:

> *Situation 10.* An officer was dispatched to a service station to investigate a petty theft. The attendant gave him a detailed description of the offender. Shortly thereafter the officer spotted the person described and stopped him for questioning. The suspect, while protesting his innocence, dropped a wrench which had the complainant's name painted

[119] The cordiality of the relationship between the "cops" and some "robbers" can be somewhat startling to the uninitiated. On one occasion, the observer was under the impression, at first, that the officer had found his long-lost brother wandering the streets. However, the surface cordiality is somewhat less than totally sincere. The suspect is trying to sell the officer the story that he is at long last settling down and "going straight," while the officer is trying to find out, by devious questioning, with whom the suspect is "working" and so forth.

[120] UTAH CODE ANN. §§ 77-13-3, -8 (1953).

on it and which apparently had been stuck under the suspect's belt beneath his coat. He claimed he had found the wrench in a vacant lot. The officer then asked him if he would like to confront his accuser and clear himself of suspicion and the suspect stated that he would. He was taken to the gas station where the attendant identified him as the thief. The officer had the attendant make a formal citizen's arrest then took the suspect to jail.

Although the officer in this situation was obviously careful to invite the suspect to return to the station of his own free will, it would still seem somewhat questionable whether there was actual consent. Motivation to clear oneself of an accusation is not in itself enough to vitiate consent,[121] but where the accused person must know that the action consented to can only result in strengthening the case against him and he still consents, it becomes apparent that he must believe that to refuse consent will have an immediate unfortunate result. It is hard to believe that the suspect in the above situation, knowing that he could walk away if he so chose, still preferred to return to a certain jail sentence.[122]

In some cases, there is no one competent to make an arrest in whose presence the misdemeanor was committed. For example, sexual offenders are usually observed only by their victims who often are too young to make an arrest. If the child points out the misdemeanant to an officer, or describes him and the officer later observes him prowling in the area, all the officer can legally do is to attempt to persuade him to identify himself so that a complaint can be made and a warrant issued for his arrest. However, many such offenders operate in wooded areas and would rather run than talk. As a result they have to be caught before they can be questioned. The temptation to apprehend this type of misdemeanant is great because such a person will rarely risk the publicity involved in legally protesting the circumstances of his apprehension. Of course, if the officer makes an illegal arrest of the wrong man under such circumstances the tort liability could be very serious.

Another difficult situation is the family fight involving assault. Usually, by the time the officers arrive on the scene, the violence has ceased. In most cases there would be little purpose in making an arrest even if one could be legally made, and the officers usually do the best they can in the role of peacemakers and then leave. Occasionally, however, it is apparent that a drunken man will resume beating his wife and children, perhaps seriously, as soon as the police leave. Wives will seldom make a citizen's arrest of their husbands, either because of fear or loyalty, so there is nothing the officers can legally do at that time even though there may be ample evidence that an

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[121] *E.g.*, Hart v. United States, 316 F.2d 916 (5th Cir. 1963).

[122] The officer speculated that the accused was a pathological liar who must preserve the integrity of his story regardless of the ultimate consequences. If he were to refuse to return with the officer, he would be acting inconsistently with his claim of innocence. The officer claimed that most petty thieves react in this manner until they are hopelessly entwined, at which point they matter-of-factly admit guilt. On the other hand, in the experience of this officer, burglars usually use better strategy which is designed to prevent conviction and are relatively unconcerned with whether or not an interrogating officer is convinced of their innocence.

assault has taken place.[123] If the situation is bad enough that the officers feel something must be done to protect the children, they attempt to lure the guilty person out into the street where he can be arrested for public intoxication or goaded into the use of "foul and abusive language" and arrested for that offense. However, in most cases the officers, realizing that they are on thin legal ice, just depart.

Detention for Felony Investigation

When a felony occurs, the immediate response and initial investigation are made by the uniform patrol. The detectives follow up with the continuing investigation. The likelihood of a detention without probable cause varies with the seriousness of the crime and the time interval following its commission. Immediately following the commission of a serious felony, when speed is of the essence and information scanty, detentions are likely to be common and indiscriminate. For example:

> *Situation 11.* A patrol car was dispatched to a west-side tavern, patronized almost exclusively by a lower class Negro element, in response to a report of a stabbing. As the car arrived on the scene, three carloads of people were leaving the parking lot of the tavern. These cars were stopped and the occupants questioned rapidly. They all denied knowing anything about the knifing. They were ordered to remain where they were, and the officers proceeded into the tavern. Although there was blood on the floor, everyone present denied that any violence had occurred, and no victim could be found. The people in the cars were interrogated further without result and released after a total detention period of about fifteen minutes.

When the officer first detained the persons in the parking lot, he, of course, had nothing approaching probable cause. All he knew was that one or more of the nine or ten people *might* have been involved in an assault or possibly a murder and the others *might* have been witnesses. With the possibility that a victim was bleeding to death inside there was obviously no time for persuasion and the obtaining of consent, and the only practical thing was to order all of them to stay where they were; the alternative being to allow them to slip away into the night. The situation at this particular tavern was complicated by the fact that the majority of the clientele and the management suscribed to a code that has as one of its precepts the proposition that a knifing is a purely personal matter unless the victim dies.[124]

[123] The Salt Lake City Prosecutor requested an advisory opinion of the Attorney General on whether there are "grounds for a lawful arrest where a drunken man in his own home threatens to do physical injury upon his wife or children even though there is no violation of law in the officer's presence and the wife refuses to sign a citizen's arrest." [July 1962–June 1964] UTAH ATT'Y GEN. BIENNIAL REPORT 97. The answer was no. *Id.* at 109.

[124] The officers in this situation expressed frustration and irritation with the complete lack of cooperation. Apparently they are opposed to enforcing a different standard for members of "subcultures" as is done in many cities. See LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 110–14 (1965). However, it is likely that the attitude evidenced by the people in the instant situation is attributable in part to the fact that, as a group, they have not been required to measure up to the standards of the rest of society in the areas from which they came.

If the perpetrator of a serious felony is not apprehended immediately the investigation proceeds, but at a more relaxed pace. If a description of the felon is available it is broadcast and patrols will interrogate anyone in the area who matches the description; but these interrogations will usually be accomplished with the consent of the person involved, at least after the initial stopping. For example:

> *Situation 12.* Detectives, who had investigated a strong-arm robbery and had obtained a description of the assailant and his automobile, observed a man who matched the description driving a car similar to the one described. The detectives signaled the car to stop, identified themselves, explained that they were investigating a crime, and asked if the suspect would answer some questions. The suspect willingly answered the questions but his answers did not entirely satisfy the detectives. They then asked him if he would be willing to go to where the victim was and the suspect agreed. The victim stated that the suspect was not the man who robbed him and the suspect was thanked for his cooperation and "released."

Although a brief detention did occur when the automobile was stopped,[125] the detectives were careful to obtain consent for the subsequent interrogation. According to the officers interviewed, most innocent persons who become suspects in a major crime are sufficiently motivated by a desire to clear themselves of suspicion and by curiosity of "what this is all about" that they are willing to cooperate. If they refuse to cooperate, this refusal is taken into account to determine if there is probable cause to make an arrest at that time. If not, the suspect is released after presenting some identification on the theory that he can be picked up later if necessary.

Interrogations are made of crime suspects at their homes and occasionally they are invited to come to the police station for a talk, but these interviews are always made with consent. The detectives, for tactical reasons, will sometimes interrogate with consent a person they have ample justification to arrest. Here, the obtaining of consent would indicate that, in practice, detention for investigation and arrest are considered two different things to the point that the detectives do not feel they can detain a person for investigation just because they have grounds to arrest him.

IV. Conclusions

It is apparent from this survey that the wide divergence between the commandments of law and the actual practices of the police which has been reported to exist in other cities does not exist in Salt Lake City. First, the police do not flaunt the law, at least openly. Second, crime conditions in Salt Lake City apparently have not reached that state where a conscientious law enforcement officer often feels compelled to take illegal short-cuts to protect the community. Third, the state of the law in Utah is amorphous enough that clear-cut rules are few in number and hence clear violations by police officers are less frequent than merely questionable procedures. How-

[125] See p. 613 & note 114 *supra.*

ever, in all probability crime conditions will get worse and questionable procedures will be attacked more often in the courts in the future. Therefore, it would be prudent to resolve the unanswered questions in the existing law and add what is needed to make the law more relevant to conditions on the street before the serious problems do develop.

Detention for Purposes of Gathering Intelligence

Under present law there is no authority for an officer to detain a person, whether an honest citizen or known felon, for purposes of gathering intelligence. However, since persons can usually be interrogated for this purpose without detention by obtaining consent, it would seem undesirable, and probably unconstitutional,[126] to attempt to give the police this authority. The high-ranking members of the Salt Lake City force who were interviewed were opposed to giving such sweeping authority to the officers in the field, although they were in favor of giving authority to stop known criminals. The real problem in this area involves the questioning of persons driving or riding in automobiles; that is, where it is impossible to speak with them or identify them without asserting authority to stop the car. It would not seem unreasonable to permit the police, by statute, to stop motor vehicles and inspect drivers' licenses even where no offense has been committed.[127] This could be justified under the police power as a reasonable regulation of the use of automobiles on the public streets[128] or by requiring that consent be given as a condition for the issuance of the driver's license.[129] Such a statute merely places the motorist in the same position as the pedestrian or the horseman of earlier times by making him subject to identification when on the streets. The motorist would not be subject to further detention or be required to answer questions, but the police officer would at least have the chance to get a closer look at him and ask for his cooperation just as he would normally with a pedestrian.

Detention for Investigation of Suspicious Persons

Under present law, the police apparently have the authority to make inquiry of suspicious persons. The scope of that authority has not been clearly

[126] The courts which have upheld the "late and unusual hours" provision of vagrancy statutes have all been careful to state that the police do not have a right to demand identification and an explanation from persons who have done no more than appear on the street. See, *e.g.*, Beail v. District of Columbia, 82 A.2d 765 (Munic. Ct. App. 1951), *rev'd on other grounds*, 201 F.2d 176 (D.C. Cir. 1952). The implication is that a statute which would give such authority to police officers would be unconstitutional.

[127] In Commonwealth v. Mitchell, 355 S.W.2d 686 (Ky. 1962), police officers established a roadblock and stopped all vehicles to check operators' licenses. One driver, who was charged for driving without a license, brought an action against the state for false arrest. The court concluded that this detention was not an unlawful arrest because the officers were acting within the scope of their authority.

[128] *E.g.*, Commonwealth v. Mitchell, 355 S.W.2d 686 (Ky. 1962).

[129] The courts often employ the "privilege doctrine" to justify police regulations. For example, in Johnson v. Sanchez, 67 N.M. 41, 351 P.2d 449, 452 (1960) the court stated that the "license to operate a motor vehicle is a mere privilege, and not a property right; and is subject to reasonable regulation under the police power in the interest of public safety and welfare." However, the doctrine is, as a practical matter, a fiction because the licensee normally does not consent to future police detention at the time he acquires his license. The right of police to stop motorists is more correctly justified by their power to protect the public welfare. See, *e.g.*, Commonwealth v. Mitchell, *supra* note 128.

defined either by statute or case law and even the federal constitutional limits are unknown. However, by combining the holding of *Wendelboe v. Jacobson*,[130] the attitude of the Utah Supreme Court indicated in that case, the vagrancy law,[131] and the experience of other jurisdictions, a theory can be derived which would reconcile the needs of the police to achieve effective law enforcement with the requirements of law to protect individual rights.

If the police approach a suspicious individual abroad at a late and unusual hour to make an investigation and the individual cooperates and willingly explains his behavior, there is, of course, no problem. If he refuses to explain or his explanation does not dispel suspicion, the investigating officer must then decide whether the facts and circumstances, including the individual's reaction to the inquiry, would warrant a prudent man to believe that the purpose for which the suspect is abroad is unlawful. If the circumstances do not so warrant, then the officer may not detain the individual against his will. If the circumstances do so warrant, then the officer has probable cause to make an arrest for vagrancy. If a formal arrest is justified, it would seem reasonable for the officer to detain the individual for a reasonable time to investigate further.[132] If further investigation dispels the inference of unlawful purpose, the officer should be free to release him.[133] If it does not, then the officer could make a formal arrest and take the individual to jail for booking.

The above approach avoids the problem of detention without probable cause by use of the vagrancy provision. It only authorizes detention in the more extreme cases; that is, where a vagrancy arrest could be made. The individual officer's salesmanship remains the primary investigatory tool, a tool which appears to be adequate for the great majority of situations which come up in the field. The only change in existing law needed to clearly establish the legality of this procedure and make it workable in dealing with the suspicious motorist, as well as pedestrian, would be that suggested in the preceding section, that is, authorization to stop automobiles to check the operator's driver's license. However, it should be noted that this section of the vagrancy statute is limited to "late and unusual" hours. While this limitation only rarely impedes the use of the statute, since it is primarily an anti-burglary weapon and burglars ordinarily work at night, there seems to be little reason for limiting the statute in this manner. It would seem that the section should be equally applicable to suspicious persons found prowling in a commercial area on Sunday afternoon or in the alley of a residential area at nine o'clock in the evening. The Model Penal Code "Loitering or Prowling" section takes a more sensible approach by limiting the applicability of the section to a time, place, or manner "not usual for law-abiding individuals."[134]

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[130] 10 Utah 2d 344, 353 P.2d 178 (1960).

[131] UTAH CODE ANN. § 76-61-1 (1963).

[132] This would in substance be an arrest and the officer could make a legal search incident thereto. The purpose in calling it a detention would be to avoid attaching a stigma to, and raising the ire of, a possibly innocent person.

[133] See note 115 *supra*.

[134] MODEL PENAL CODE § 250.6 (Proposed Official Draft 1962), quoted in full p. 605 *supra*.

Detention for Initial Crime Investigation

When the police first arrive at the scene of a crime and a number of people are there, the command, "no one leave this room," seems to be appropriate, at least to anyone who has seen a number of detective movies, that it is almost sacreligious to question its legality. However, such a command does result in the detention of those present and, obviously, there is not probable cause to arrest all of them. If the hard and fast rule that any detention is an arrest is applied to such a situation the result is a finding of false arrest. However, there are apparently no cases where such an absurd result is reached. The better view would seem to be that the detention of persons at the scene of a crime is similar to the detention of motorists who have been involved in an accident or the control of crowds at a fire and constitutes a reasonable exercise of police power under emergency conditions.[135]

Once the police have brought the situation under control and have had a chance to make initial inquiries of those present, the emergency exception would no longer apply and further interrogations would have to be accomplished by obtaining consent or by making arrests. Likewise, as the investigation spreads beyond the immediate environs of the crime scene, the emergency nature of the investigation would dissipate and interrogations would have to be justified under the normal rules. Thus, the emergency exception would not justify the general round-ups that are reported to occur in the larger cities.[136]

Arrest for Misdemeanor

The distinction between misdemeanors which are committed in the presence of an officer and those which are not seems to be a poor one upon which to base the determination of whether a person can be arrested or not. The reason for the distinction has disappeared with the nonprofessional citizen-enforcement system of early England and America. No longer can the ordinary citizen be expected to bring offenders to justice, especially at the risk of violence. The citizen expects assistance from those he pays to assume the duties, and rigors, of enforcing the law. He is befuddled when he is told that a peace officer is powerless to arrest an offender who is obviously guilty and who will escape altogether if not apprehended. It is not surprising, therefore, that subterfuges have developed to circumvent the unrealistic strictures of this aspect of arrest law. As one distinguished author has put it:

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[135] In Brinegar v. United States, 338 U.S. 160, 182–83 (1949) (dissenting opinion) Mr. Justice Jackson suggested the propriety of allowing a detention and search in certain emergency situations. For example:

> If we assume . . . that a child is kidnaped and the officers throw a roadblock about the neighborhood and search every outgoing car, it would be a drastic and undiscriminating use of the search. The officers might be unable to show probable cause for searching any particular car. However, I should candidly strive hard to sustain such an action, executed fairly and in good faith, because it might be reasonable to subject travelers to that indignity if it was the only way to save a threatened life and detect a vicious crime.

[136] See WILLIAMS, ONE MAN'S FREEDOM 145 (1962); Note, *Philadelphia Police Practice and the Law of Arrest*, 100 U. PA. L. REV. 1182, 1205 (1952).

"If these limitations on the law of arrest were honestly adhered to, law enforcement would be paralyzed especially in the area of petty thefts."[137]

What is perhaps more disturbing to those concerned with individual liberty is that the law does not limit arrest to those cases where it is necessary. While the law may condemn the arrest of an escaping thief or the potentially dangerous wife- and child-beater, it condones the arrest of a citizen who drops a gum wrapper in the gutter provided, forsooth, it is done in the presence of the arresting officer. It does not matter that the offender may be brought to justice by less oppressive means.[138] It does not matter that the only purpose for the arrest may be to harass, to give vent to prejudice, or to punish for offending the officer's dignity. An officer who makes such an arrest may be held in contempt by his fellow officers, but he is vindicated by the law.

The decision to arrest should hinge upon its necessity rather than upon the fortuitous circumstances of whether the offense occurred in the presence of the officer. Whatever function the in-presence requirement fulfills as a test of the strength of evidence of guilt can be more directly fulfilled by the requirement of probable cause, which could, if necessary, be made more strict for misdemeanors. Those factors having a bearing upon the necessity for an arrest in a given situation would seem to be the probability of the offender's escaping prosecution and the danger of his continuing to work his mischief to the detriment of the personal safety or property of himself or others. The Wisconsin arrest statute is a good example of the application of such a test. It provides:

> An arrest by a peace officer without a warrant for a misdemeanor or for the violation of an ordinance is lawful whenever the officer has reasonable grounds to believe that the person to be arrested has committed a misdemeanor or has violated an ordinance and will not be apprehended unless immediately arrested or that personal or property damage may likely be done unless immediately arrested.[139]

There would seem to be no reason to limit this type of test to misdemeanors. The elimination of the distinction between felony and misdemeanor by the application of the above test to both would free the officer from having to characterize correctly, on the spot, the crime committed—a characterization which is often next to impossible to make.

The constitutionality of such a statute might be questioned on the ground that the common law limitations on arrest without a warrant, in their entirety, were incorporated into the fourth amendment. However, the Constitution did not freeze for all time every detail of criminal procedure as it

[137] Ploscowe, *A Modern Law of Arrest*, 39 MINN. L. REV. 473, 475 (1955).

[138] See Odinetz v. Budds, 315 Mich. 512, 24 N.W.2d 193 (1946), where a long-time resident of the locality was arrested for operating a restaurant without a license. The court did not approve of the use of arrest rather than a summons but it stated that it was not illegal.

Only one arrest was observed in this study where it was questionable whether it was necessary. An out-of-state motorist who had no permanent address was arrested rather than issued a citation for driving without a valid license. This action was disapproved by two other officers who observed it, although they did not say anything to the officer who made the arrest.

For a discussion of other methods of starting the criminal process see Robinson, *Alternatives to Arrest of Lesser Offenders*, in 11 CRIME AND DELINQUENCY 8 (1965).

[139] WIS. STAT. ANN. § 954.03(1) (1958).

existed in the eighteenth century regardless of its worth in modern times.[140] Furthermore, the United States Supreme Court has stated on several occasions that it is only unreasonable practices which are forbidden by the Constitution[141] and that the states are free to work out their own rules within the limits of reasonableness required by the Constitution.[142] It is submitted that arrest powers contingent upon probable cause and the necessity for an arrest are more reasonable and more conducive to maintaining the liberty of the individual than are those powers which are contingent upon whether an offense occurred within the presence of the arresting officer.

Arrest in Criminal and Tort Law

Since questions of the legality of an arrest have traditionally arisen primarily in tort actions for false arrest and a body of tort law has developed on the subject, there is a natural tendency for courts to rely on that law in deciding similar questions in criminal proceedings. However, this tendency to apply tort law to criminal procedure problems must be restrained if an intelligible and workable body of criminal arrest law is to be developed. The determination of the legality of an arrest in a tort action and the same determination in criminal proceedings involve different considerations, objectives, and consequences. A tort action is essentially the resolution of a clash of interests between individuals with the interest of the commonweal as an important, but incidental, factor.[143] The critical evaluations are of the culpability of one party and the injury to the other party,[144] the primary objective being to compensate the injured party.[145] Any deprivation of freedom of movement constitutes an arrest which may be justified by a variety of defenses and privileges, some of which are entirely unrelated to the criminal process.[146]

On the other hand, questions of criminal procedure arise from a clash between the exercise of state power and the rights of an individual. Neither the good faith of the police officer nor the guilt of the defendant is especially

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[140] For example, while it is clear that at common law misdemeanor arrests without a warrant could only be made for breaches of the peace, *e.g.*, Commonwealth v. Gorman, 288 Mass. 294, 192 N.E. 618 (1934), the great majority of jurisdictions today permits misdemeanor arrests for any offense committed in the presence of the officer. Machen, *Arrest Without Warrant in Misdemeanor Cases*, 33 N.C.L. REV. 17, 20–21 (1954). Such modification of powers of arrest, although it greatly broadened the grounds for arrest, seems to have been accepted as constitutional. See, *e.g.*, Hart v. United States, 316 F.2d 916 (5th Cir. 1963); United States v. Williams, 314 F.2d 795 (6th Cir. 1963); Gault v. State, 231 Md. 78, 188 A.2d 539, *cert. denied*, 375 U.S. 851 (1963); Wendelboe v. Jacobson, 10 Utah 2d 344, 353 P.2d 178 (1960).

At least one federal court has sustained a misdemeanor arrest for an offense not committed in the presence of the officer. The court in that case said: "*Does an arrest without a warrant for a misdemeanor not committed in the presence of the arresting officer meet federal constitutional standards?* The answer is 'yes.'" United States v. Grosso, 225 F. Supp. 161, 169 (D. Pa. 1964).

[141] See, *e.g.*, Mapp v. Ohio, 367 U.S. 643, 653 (1961).

[142] *E.g.*, Ker v. California, 374 U.S. 23, 34 (1963).

[143] PROSSER, TORTS § 3, at 14 (3d ed. 1964).

[144] *Id.* § 4, at 16.

[145] *Id.* § 3.

[146] For example, a teacher who confines a pupil to a classroom for disciplinary purposes imprisons the child but is not liable therefor because of the privilege to discipline by reasonable means. Fertich v. Michener, 111 Ind. 472, 11 N.E. 605 (1887).

relevant in determining the legality of an arrest,[147] and the result of a determination of illegality, the suppression of evidence, does not have as its purpose the compensation of the defendant. Rather, the courts have often stated that the incidental benefit to the defendant is the price which must be paid to preserve liberty.[148]

The jury system adds to the variance between the two types of cases because a jury would be reluctant to give damages to an obviously guilty defendant against a police officer who made a good-faith error.[149] Because of this, tort actions tend to be brought only by law-abiding citizens who have been subjected to outrageous treatment, and hence, appellate courts often decide questions of tort law in the context of facts which are far removed from those which might be the setting for a ruling in a criminal case.

It is submitted, therefore, that in the development of case law and the drafting of statutes, a distinction should be drawn between a valid arrest in criminal procedure and a privileged arrest in tort law. Although there are broad overlaps between the two fields, care should be exercised in applying rules from tort cases and treatises to questions of arrest in criminal proceedings to ascertain the validity of the application.[150]

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[147] The United States Supreme Court stated in Beck v. Ohio, 379 U.S. 89, 97 (1964) that good faith on the part of the arresting officer is not enough to validate an otherwise illegal arrest. In Larson v. Feeney, 196 Mich. 1, 162 N.W. 275 (1917) the court held that the plaintiff's plea of guilty to a disorderly conduct charge did not prevent her from bringing an action for false arrest.

While the general rule in tort law is also that good faith is not a defense, see RESTATEMENT, TORTS §§ 44, 121, comment *i* (1934), the practical effect of such good faith on the jury, especially where the plaintiff is obviously guilty of a crime or of generally bad character, is probably equivalent to a complete defense. See Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955).

[148] *E.g.*, Mapp v. Ohio, 367 U.S. 643, 658 (1961).

[149] See Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955).

[150] Prosser warns of the converse — that "the criminal law must be regarded as a very unreliable analogy to the law of torts." PROSSER, TORTS § 9 (3d ed. 1964).